IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:18-04113-CR-RK
	)	
(1) BRANDON EUGENE MCNEESE,	)	
	)	
Defendant.	)	

ORDER ADOPTING REPORT AND RECOMMENDATIONS

Before the Court is Defendant Brandon Eugene McNeese's Motion to Suppress (Doc. 20). An evidentiary hearing was held on June 11 and June 17, 2019, before United States Magistrate Judge Willie Epps, Jr. On June 21, 2019, Judge Epps issued the Report and Recommendation ("R&R") (Doc. 64). Defendant filed objections to the R&R (Doc. 65). The Government did not file a response.

Pursuant to Federal Rule of Criminal Procedure 59(b)(3), "[a] district judge must consider de novo any objection to a magistrate judge's recommendation." After an independent, de novo review of the record, including all exhibits admitted at the evidentiary hearing, the applicable law, and the parties' objections and original motions, the Court adopts the Report and Recommendation of Judge Epps in its entirety.

This Court believes additional analysis regarding Defendant's last objection is probative. Namely, Defendant argues the warrantless seizure of Defendant's car (the "Cougar") was illegal. (Doc. 64). Defendant's objection, however, is without merit. First, this Court finds no conclusive reason why the Cougar should not be considered a car for Fourth Amendment purposes. Even though the Cougar had flat tires and may have been disabled, that does not necessarily remove it from the car exception. It is well settled that the warrantless seizure of a car (and even warrantless search) is permissible so long as probable cause exists. *Chambers v. Maroney*, 399 U.S. 42, 52 (1970). Thus, the seizure of the Cougar, based on clear probable cause, was reasonable.

Second, even conceding, which this Court does not do, the Cougar did not fall under the car exception, the seizure was nonetheless permissible. "Law enforcement officers may seize a container and hold it until they obtain a search warrant." *California v. Acevedo*, 500 U.S. 565,

575, 111 S. Ct. 1982, 1989, 114 L. Ed. 2d 619 (1991); *See also United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641, 77 L. Ed. 2d 110 (1983) ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.") Here, the Cougar was in the driveway of his sister's house. Absent the officer's seizure of the car, the evidence therein could have easily been moved or destroyed. *See generally, United States v. Leveringston*, 397 F.3d 1112, 1116 (8th Cir. 2005). Officers therefore, properly seized the Cougar, applied for a warrant, and only then proceeded to search the Cougar.

Accordingly, it is **ORDERED** that:

(1) Defendant's Motion to Suppress (Doc. 20) is **DENIED.**

(2) Magistrate Judge Willie Epps, Jr.'s Report and Recommendation (Doc. 64) shall be attached to and made a part of this Order.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: August 27, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18-CR-04113-RK-1
	)	
	)	
BRANDON EUGENE MCNEESE,	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Pending before the Court is Defendant Brandon Eugene McNeese's Motion to Suppress Evidence. (Doc. 20). The Government has filed suggestions in opposition (Doc. 28), and the motion is now ripe for consideration. For the reasons that follow, it is recommended Defendant's motion be denied.

I. Findings of Fact

In early August 2018, a Confidential Informant (CI) met with Defendant to purchase methamphetamine. (Doc. 1-1); (Doc. 62 at 12:1-9). Defendant met with the CI at 220 W. Ashley, in Jefferson City, MO. (Doc. 1-1); (Doc. 62 at 12:14-17). Shortly thereafter Defendant departed from 220 W. Ashley, and the CI advised law enforcement that Defendant left to retrieve narcotics. (Doc. 1-1); (Doc. 62 at 12:17-18). Defendant traveled to 420 Hickory, in Jefferson City, MO, where his sister (JD) resided. (Doc. 1-1); (Doc. 62 at 12:17-18). A white Mercury Cougar was parked in the driveway of JD's residence. (Doc. 1-1); (Doc. 62 at 12:23-24, 13:9-16). Defendant approached the Cougar, opened the trunk, leaned inside, and "maneuvered items for a couple of minutes before closing the trunk." (Doc. 1-1); (Doc. 62 at 13:9-16). Defendant also briefly entered JD's house before and after accessing the trunk. (Doc. 1-1). Roughly ten minutes later, Defendant returned to 220 W. Ashley and sold 139 grams of methamphetamine to the CI. (Doc. 1-1); (Doc. 62 at 13:17-14:10). Similarly, a few days later Defendant conducted another sale of methamphetamine in East St. Louis with a CI. (Doc. 62 at 15:10-16:7).

Defendant was arrested for the above incidents in late September 2018. (Doc. 1-1); (Doc. 62 at 16:15-17:19). Law enforcement shortly thereafter conducted a "knock and talk" at JD's home on 420 Hickory. (Doc. 1-1); (Doc. 62 at 18:7-9, 56:11-12). JD was present at the time and consented to a search of the residence. (Doc. 1-1); (Doc. 62 at 18:9, 57:19-58:4); (Doc. 63 at 4:8-10, 6:3-8). Three officers testified that JD never revoked, modified, or otherwise changed the scope of consent she originally provided. (Doc. 62 at 26:5-8, 61:20-24); (Doc. 63 at 9:15-20, 16:3-9). JD stated she could not provide consent for the Cougar parked in the driveway, explaining that the vehicle belonged to Mr. McNeese. (Doc. 1-1); (Doc. 62 at 18:14-17, 62:8-9). JD noted that Defendant frequently visited her home to "mess with" the Cougar, but rarely came inside the residence. (Doc 1-1) (Doc. 62 at 62:22-63:6); (Doc. 63 at 10:15-16).

Shortly thereafter, investigators found a transparent cellophane bag near the Cougar that contained white powder. (Doc. 1-1); (Doc. 62 at 18:16- 17, 58:14-17). A drug-detecting K9 later arrived and alerted to the presence of controlled substances within the Cougar. (Doc. 1-1); (Doc. 62 at 21:23-22:1). The Jefferson City Police Department then seized the vehicle. (Doc. 1-1); (Doc. 62 at 22:1-4). Officers later obtained a search warrant and, using a car key found on Defendant at the time of his arrest,[1] accessed and searched the Cougar. (Doc. 1-1); (Doc. 62 at 22:17-19, 23:23-24:13). Ultimately, officers recovered 506 grams of cocaine and multiple stolen firearms from inside the vehicle. (Doc. 1-1); (Doc. 62 at 24:14-18).

The Court held an evidentiary hearing regarding the motion to suppress on June 11, 2019, and June 17, 2019. (Docs. 62 & 63). Mr. McNeese was represented by attorney Daniel Hunt. (Doc. 62). The Government was represented by Assistant United States Attorney Lawrence Miller. *Id.* The Government called Probation Officer Cheryl Smallwood, Detective Mark Goodson, Officer David Davis, and Officer Carrol Rinehart, III. *Id.* at 93; (Doc. 63 at 42:4). The defense called Mr. McNeese's sister, JD. (Doc. 62 at 93).

The Court makes the following credibility determinations after a careful review of the record: Cheryl Smallwood, Mark Goodson, David Davis, and Carrol Rinehart, III, were all very credible. The Court gives greater weight to these witnesses because their testimony was consistent with other evidence in the record. Moreover, despite being sequestered, the respective testimony of Mr. Goodson, Mr. Davis, and Mr. Rinehart were all substantially corroborated.

[1] Defendant denied ownership of the Cougar. (Doc. 1-1).

The Court finds JD's testimony had very little credibility, in part because she testified inconsistently with a substantial amount of evidence in the record. Specifically, JD testified she never gave officers permission to search anywhere other than inside her home. (Doc. 62 at 81:21-23, 83:5-10, 87:18-21, 87:22-88:2). However, as noted above, three credible witnesses stated that JD consented to a search of the entire premises. (Doc. 1-1); (Doc. 62 at 18:9, 57:19-58:4); (Doc. 63 at 4:8-10, 6:3-8). JD also testified that officers gave her no response when she told them to stop searching outdoors after a period of hours had passed. (Doc. 62 at 91:3-5). But as previously discussed, three credible witnesses testified JD never modified or revoked her consent. (Doc. 62 at 26:5-8, 61:20-24); (Doc. 63 at 9:15-20, 16:3-9). Moreover, JD claimed the Cougar was in fact not Mr. McNeese's vehicle, despite credible testimony from witnesses that she previously stated otherwise. (Doc. 1-1); (Doc. 62 at 18:14-17, 62:8-9, 82:3-8). The Court accordingly gives very little weight to such testimony.

Lastly, after reviewing the record the Court finds Mr. McNeese never resided at 420 Hickory, or otherwise had a possessory or ownership interest in the property. Mr. McNeese's probation officer from June 2012 to June 2016 testified that Defendant never claimed a residence at 420 Hickory in Jefferson City, MO. (Doc. 62 at 8:25-9:15). Law enforcement also noted that Defendant often visited JD's home for short periods of time based on a GPS tracking device. (Doc. 62 at 45:14-22, 48:24-49:3). Furthermore, JD stated she was the only individual to sign the lease at 420 Hickory. (Doc. 62 at 85:10-17). JD also suggested that Mr. McNeese's interest in 420 Hickory was limited to possessing a key to the house and having permission to come and go as he wanted. (Doc. 62 at 82:13-16). As a consequence, the Court finds Mr. McNeese never resided at, owned, or had a possessory interest in 420 Hickory.

II. Discussion

The main thrust of Defendant's motion argues that officers unconstitutionally seized a cellophane baggie of narcotics near the Cougar, which was parked in the curtilage of JD's residence at 420 Hickory, without a warrant. Defendant claims all evidence flowing from the seizure should therefore be excluded. In response, the Government asserts that Defendant did not reside at 420 Hickory, and therefore cannot invoke the Fourth Amendment protections afforded to its residents. The Government further explains the cellophane baggie was lawfully seized under the plain view doctrine. For the reasons that follow, Defendant's motion is denied.

a. Defendant had no Fourth Amendment protections arising from 420 Hickory.

The Fourth Amendment's "very core stands for the right of a man to retreat *into his own home* and there be free from unreasonable governmental intrusion." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (emphasis added) (quotation and citation omitted). "[T]he area immediately surrounding and associated with the home," known as curtilage, is also afforded Fourth Amendment protection. *Id.* (quotation and citation omitted). This association is strong enough that curtilage is considered "to be part of the home itself." *Id.*

When challenging a Fourth Amendment search or seizure, a defendant must show (1) a reasonable expectation of privacy existed "in the areas searched or the items seized, and (2) society is prepared to accept the expectation of privacy as objectively reasonable." *United States v. Skoda*, 705 F.3d 834, 837 (8th Cir. 2013) (citing *United States v. Ruiz-Zarate*, 678 F.3d 683, 689 (8th Cir. 2012)). However, rights arising under the Fourth Amendment "are personal and may not be vicariously asserted." *Id.* (citation omitted) (explaining a defendant had no reasonable expectation of privacy in his father's home when the defendant had no ownership or possessory interest in the home and did not reside there); *United States v. Beasley*, 688 F.3d 523, 531 (8th Cir. 2012) (noting the defendant "did not live in [his mother's] home and had no expectation of privacy in the home or its back room"); *United States v. Sturgis*, 238 F.3d 956, 958 (8th Cir. 2001) (a defendant had no expectation of privacy when briefly visiting a drug dealer's motel room to purchase narcotics).

Moreover, police may enter private property so long as "their movements [are restricted] to . . . areas generally made accessible to visitors–such as driveways, walkways, or similar passageways" to announce their presence. *United States v. Weston*, 443 F.3d 661, 667 (8th Cir. 2006); *United States v. Reed*, 733 F.3d 492, 501 (8th Cir. 1984). This principle, known as a knock and talk, is "grounded in the homeowner's implied consent to be contacted at home." *United States v. Wells*, 648 F.3d 671, 679 (8th Cir. 2011). "Where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited." *United States v. Robbins*, 682 F.3d 1111, 1115 (8th Cir. 2012) (quoting *Weston*, 443 F.3d at 667).

Here, Defendant had no reasonable expectation of privacy by parking his vehicle in the curtilage of 420 Hickory. Defendant does not claim he resided at 420 Hickory or otherwise had a possessory or ownership interest in the home. In fact, from the record it appears Defendant did not spend prolonged periods of time at JD's home. (Doc. 1-1). Even assuming Defendant had a key

to 420 Hickory and permission to park his vehicle on the property, such facts do not rise to implicate a Fourth Amendment interest. *Beasley*, 688 F.3d at 531 (noting the defendant "did not live in [his mother's] home and had no expectation of privacy in the home or its back room"). Mr. McNeese cannot vicariously invoke his sister's Fourth Amendment right to be free from unreasonable governmental intrusion in her home. *Id.*; *Skoda*, 705 F.3d at 837; *Sturgis*, 238 F.3d at 958. As a consequence, Mr. McNeese cannot contest the search of 420 Hickory.[2] Thus, what remains is whether officers comported with the plain view doctrine when they seized evidence incriminating Defendant from near a vehicle parked at 420 Hickory.

b. Officers properly seized narcotics near the Cougar in plain view.

Next, a warrantless seizure of incriminating evidence from private property is lawful when the following elements are met: (1) the evidence is in plain view; (2) the evidence is immediately apparent in its incriminating nature; and (3) the officer is "lawfully located in a place" to view such evidence, with "a lawful right of access to the [evidence] itself." *Horton v. California*, 496 U.S. 128, 136–37 (1990) (citations omitted); *United States v. Abumayyaleh*, 530 F.3d 641, 648–49 (8th Cir. 2008) (noting the discovery of evidence under the plain view doctrine need not be inadvertent).

Here, the warrantless seizure of narcotics from beneath the Cougar–which set off a chain of events leading to the recovery of drugs and guns from inside the vehicle–was proper. First, the seized evidence was in plain view next to the vehicle. From the record it appears officers saw a clear bag full of white powder located on the ground close to the Cougar. While Defendant claims officers "searched" near the Cougar, there is no evidence or claim that officers moved, opened, or otherwise physically manipulated the Cougar or cellophane bag in any way that led to the discovery of narcotics on the ground. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (finding a stereo's serial number was not in "plain view" when an officer had to move the equipment a few inches to ascertain it). The bag was therefore in plain view.

[2] The Court notes that even if Mr. McNeese had an expectation of privacy at 420 Hickory, he would nonetheless be unable to contest the seizure of evidence near the Cougar in plain view. JD had authority to consent to a search of her own premises. *United States v. Twiford*, 315 F. Supp. 801, 803 (W.D. Mo. 1970) (citations and quotations omitted) ("[W]here two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.").

Second, the seized evidence was immediately apparent in its incriminating nature. The evidence under the Cougar consisted of a clear baggie full of white powder. Such evidence is obvious in its incriminating nature as potentially containing illegal narcotics.

Third, officers were authorized to be on JD's property and had lawful access to the evidence. Officers previously observed Defendant visit 420 Hickory during a drug transaction, open and maneuver items in the Cougar's trunk, and then leave to complete a sale to the CI. Police were well within constitutional bounds by performing a "knock and talk" with JD at 420 Hickory. JD's consent to search the residence further expanded the legitimate scope of law enforcement's presence on the premises. As discussed above, the Court found JD never revoked or modified her consent. Officers were therefore permitted to search the premises and seize incriminating evidence in plain view in the driveway. *See United States v. Reinholz*, 245 F.3d 765, 777 (8th Cir. 2001) (explaining that officers, who were executing a valid search warrant for a residence, also lawfully searched a vehicle parked in the driveway because narcotics were in plain view through the car's windows); *see also Horton*, 496 U.S. at 136–37; *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). Thus the narcotics seized from beneath the Cougar are admissible.

c. Defendant's remaining arguments are without merit.

Defendant argues several other points without success. First, the affidavit supporting the search warrant stated that drugs were found "underneath" the Cougar, but photos from the scene show a baggie of white powder near–but not below–the vehicle. The Court finds no reason to suppress evidence in this case based on such a relatively trivial error. Second, the affidavit also stated the Cougar's key was recovered from Mr. McNeese's person. It was speculated at the hearing that officers stuck the key into the Cougar's door lock to determine whether it fit before obtaining a search warrant. (Doc. 62 at 36:23-37:3). Defendant argues, without supporting authority, that sticking a key into the vehicle lock constituted an illegal search. However, this argument appears to be unpersuasive in the Eighth Circuit. *United States v. Cowan*, 674 F.3d 947, 956 (8th Cir. 2012) (explaining an officer's use of a key fob to identify a defendant's vehicle was constitutional–even if such conduct amounted to a search or seizure under the Fourth Amendment) (citing *United States v. Salgado*, 250 F.3d 438, 456 (6th Cir. 2001) (simply inserting a key into a vehicle lock to determine if it fits is not a search); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1087–88 (9th Cir. 2000) (similar); *United States v. Lyons*, 898 F.2d 210, 213 (1st Cir. 1990) (similar)).

Third, Defendant also seems to challenge the seizure and search of the Cougar. However, the proximity and location of the narcotics near the vehicle, coupled with law enforcement's prior suspicions of Defendant's illegal activities with the Cougar, rose to the level of reasonable suspicion to justify the K9 sniff. *See United States v. Place*, 462 U.S. 696, 708–09 (1983) (use of a drug sniff is minimally invasive and does not constitute a search); *United States v. Pulido-Ayala*, 892 F.3d 315, 318 (8th Cir. 2018). Officers most likely could have conducted a warrantless search after the K9 alerted to the presence of drugs in the vehicle. *See United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010); *United States v. Simeon*, 115 F. Supp. 3d 981, 999 (N.D. Iowa 2015). Instead, law enforcement prudently seized and towed the vehicle to impound. Only after receiving a search warrant did officers search the vehicle.[3] Therefore, evidence recovered from the search of the Cougar is admissible.

In sum, narcotics evidence gathered from beneath Defendant's parked vehicle complied with the plain view doctrine. The subsequent dog sniff, vehicle seizure, vehicle search, and evidence collection were all similarly lawful. Defendant's motion is denied.

III. Conclusion

For the reasons above, the Court concludes that Defendant's arguments regarding evidence suppression in this case are without merit, and the Motion to Suppress should be denied.

Accordingly, IT IS THEREFORE RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order DENYING Defendant Brandon Eugene McNeese's Motion to Suppress. (Doc. 20).

Counsel are reminded that each party has fourteen (14) days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in the Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

[3] Defendant appears to claim that officers illegally searched the Cougar after seizing the vehicle but before obtaining a search warrant. Even taken as true, officers were authorized to conduct a warrantless search of the vehicle while it was impounded. *See Florida v. Meyers*, 466 U.S. 380, 382 (1984); *United States v. Thompson*, 925 F.2d 234, 236 (8th Cir. 1991).

Dated this 21st day of June, 2019, at Jefferson City, Missouri.

Willie J. Epps, Jr.

Willie J. Epps, Jr.
United States Magistrate Judge